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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ABBAS ASSAR, M.D.,
Petitioner,

v.

CRESCENT COUNTIES FOUNDATION FOR MEDICAL CARE,
and
CENTRAL ILLINOIS MEDICAL REVIEW ORGANIZATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE ILLINOIS STATE MEDICAL SOCIETY IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE ILLINOIS STATE MEDICAL SOCIETY IN SUPPORT OF PETITIONER

INTRODUCTION

This brief is submitted by *amicus curiae*, the Illinois State Medical Society ("ISMS") in support of Appellee, Abbas Assar's M.D., Petition for a Writ of Certiorari. ISMS believes it important for the United States Supreme Court to take this case on review to clearly establish that a cause of action for monetary damages is available for an individual whose constitutional rights are violated when the United States Government through officers, employees or agents violates or fails to implement the statutory and regulatory mandates of a federal program and prevents

the individual from obtaining any form of administrative and judicial review provided under the statutory mandates.

The United States District Court for the Central District of Illinois dismissed this case for lack of subject matter jurisdiction because it found that a *Bivens* remedy is not available to the plaintiff as a matter of law. *Assar v. Crescent Counties Foundation for Medical Care and Central Illinois Medical Review Organization*, No. 92-2161 (C.D. Ill. Oct. 6, 1992). The United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the case finding "No *Bivens* remedy is available to Assar in light to the comprehensive remedial scheme set forth in the statute and regulations." *Assar v. Crescent Counties Foundation for Medical Care and Central Illinois Medical Review Organization*, No. 92-3678, Slip Op. at 11, (7th Cir. Dec. 29, 1993). Petitioner filed his Petition for Writ of Certiorari in this case June 6, 1994.

ISMS has sought the acceptance for filing this *amicus curiae* brief from Crescent Counties Foundation for Medical Care ("CCFMC") and Central Illinois Medical Review Organization, ("CIMRO") Respondents. The affirmative responses of these organizations have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This Petition for Writ of Certiorari should be granted by the United States Supreme Court to determine whether federal officials can ignore statutory and regulatory mandates and violate an individual's constitutional rights and not be subject to a cause of action for monetary relief under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). ISMS believes that the appellate court's decision affirms the alleged unconstitutional deprivation of Petitioner's property without due process of law. This decision has devastating effects on the Petitioner, on physicians and on the medicare program.

Physician participants have been told by the appellate court that peer review organizations can do anything they desire, without any basis in fact, even the deprivation of a physician's livelihood. Physicians cannot defend themselves in any way. Further, this appellate court's decision creates a conflict between the United States Court of Appeals for the Seventh Circuit, United States Court of Appeals for the Eighth Circuit and the United States Court of Appeals for the Federal Circuit on this issue.

The United States Courts of Appeals for the Eighth Circuit and the Federal Circuit have both determined that a *Bivens* claim is warranted when a federal official obstructs the comprehensive statutory and regulatory safeguards established by Congress and the agency. *Glasgow v. United States Drug Enforcement Administration*, 12 F.3d 795 (8th Cir. 1993) and *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988).

ARGUMENT

ISMS believes that an important point of law is at question in this case. This important point is whether officials, employees or agents for the federal government, can ignore statutory and regulatory mandates and deny or severely restrict participation in a federal program without affording the due process rights provided for under the law and be above a claim for monetary relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Being a professional association representing approximately 18,000 Illinois physicians, ISMS has an interest and a unique perspective of the implications of the resolution of this issue, beyond the effect on the parties in this particular cause of action. This issue has far reaching implications in the health care industry. In an era where the marketplace is drastically changing and managed care is coming to the forefront as the dominant methodology for providing private and public health care

insurance or funding, health care providers are finding themselves excluded from participation arbitrarily and capriciously without any due process procedures to protect their livelihood. If no rights to damages exist in a federally maintained system such as here, trust and respect for the managers of the system will diminish as will the willingness to participate.

A physician's participation in the federal medicare program is clearly a property interest which cannot be deprived by the federal government without due process of law. *Northlake Community Hospital v. United States*, 654 F.2d 1234, 1241-3 (7th Cir. 1981). The United States Congress through the Social Security Act and the Secretary of the Department of Health and Human Services ("Secretary") through regulations have established a comprehensive statutory and regulatory scheme which includes specific provisions requiring the Secretary to provide due process protections for those persons who participate in the medicare program including physicians. 42 U.S.C. § 1320c-5(b)(1) (1991); 42 C.F.R. § 1004.10-1004.100 and Part 498 (1991).

These protections, as identified by the Appellate and District Courts, consist of a comprehensive statutory and regulatory scheme to provide administrative and judicial review which require peer review organizations to conduct investigations and to submit reports and recommendations to the Secretary. 42 U.S.C. § 1320c-5 (1991); 42 C.F.R. 1004.60-80 (1991). The Secretary then may sanction a provider after the opportunity for a hearing. 42 C.F.R. § 1004.100 and 42 C.F.R. 498 (1991). The Appellants, however, allegedly failed to follow this statutory and regulatory scheme and instead implemented a non-statutory and non-regulatory procedure circumventing this scheme.

The appellate and district court decisions, in essence, send a message to federal officials acting under color of law that they can ignore statutory and regulatory man-

dates. This includes due process requirements intended to protect participants in federal programs for violation of their constitutional rights. They can arbitrarily and unreasonably restrict or deny participation in the program without having to explain the reasons for such restrictions and without allowing the participant a reasonable opportunity to contest the allegations or accuracy of their information or the validity of their conclusions.

With respect to the medicare program, the appellate and district court decisions send the message to physicians and other health care providers throughout the United States that the courts will allow peer review organizations to flagrantly ignore statutorily and regulatory due process protections.

Petitioner's First Amended Complaint sufficiently plead clear allegations of violations of the comprehensive and regulatory requirements of the Medicare program to establish a cause of action for monetary damages against federal officials for constitutional violations to allow the District Court to adjudicate the merits of the allegations. (1st Am. Compl., App. Brief A-2-52) These alleged violations, in part, consist of the following:

- CIMRO determined Petitioner committed a gross and flagrant quality of care deficiency involving a medicare patient and did not provide Petitioner with a written notice of the determination.
- CIMRO imposed practice restrictions and limitations (sanctions) on Petitioner.
- CIMRO failed to report the determinations to the Office of the Inspector General (OIG)
- CIMRO made false, defamatory and misleading statements concerning Petitioner to third parties.
- CIMRO acted maliciously and retaliated against Petitioner for successful defense of previous CIMRO actions.

- CIMRO and the Secretary refused all attempts to appeal sanctions by Petitioner.
- CIMRO refused to disclose information about this matter to Petitioner.

(1st Am. Comp., App. Brief, A3-6)

The logical and unfortunately expected result of violations of the nature plead in this case is the significant or complete deprivation of a physician's livelihood. Physicians professional life and livelihood is based almost entirely upon their peers, hospital administrations and patient perceptions of the ability to provide the highest quality of care. When a physician's reputation is tarnished whether validly or not, the physician's ability to practice is significantly effected.

Lies, innuendo and false gossip can destroy the professional career of a physician. When these things happen, the damage is already done and restoring your good name or reputation is extremely difficult. In private acitons, physicians have the ability to resort to initiating causes of action for defamation, invasion of privacy, or restriction of trade.

Federal officials who are required to execute and uphold the laws of the United States may at times also disseminate lies, innuendo and falsehoods and thus violate statutory and regulatory mandates. Congress attempts to protect the public from these types of actions by federal officials through enactment of statutory due process requirements. When federal officials violate statutory and regulatory mandates, they should not be allowed to hide behind the mere existence of the statutory and regulatory mandates in statute books to prevent redress of the injustices committed by such federal officials.

Additionally, the appellate and district court decisions undermine the effectiveness and ability of peer review organizations such as Respondents to perform their duties. As peer review organizations, their paramount

duty is to review the care provided to medicare recipients and ensure that the care is provided within the guidelines set forth in the Social Security Act. 42 U.S.C. § 1320c-5 (1991) This peer review function is best conducted with the voluntary participation by all parties.

To effectively tell the physicians of the State of Illinois that CCFM and CIMRO can ignore the statutory and regulatory requirements of the medicare program and implement procedures outside these requirements by sanctioning physicians while at the same time not allowing physicians any opportunity for a hearing to fully delineate their views on the matter will severely impact the medicare program, individual physicians, and the peer review process itself.

Congress has in many statutory programs, of the need for spoken federal officials to explain to people participating in programs what their rights are for appeal of agency decisions. Congress' understanding of the information and knowledge of persons before agencies has resulted in many programs setting forth detailed information on what must actually be provided to a person regulated by the agency.

As in this case, this information includes informing the individual's regulated of their rights to comment or appeal, if any, when an adverse agency decision is made. 42 U.S.C. § 1320c-5 (1991); 42 C.F.R. § 1004.30 (1991). It stands to reason that individuals should be able to rely upon the agencies meeting its statutory mandate and informing the parties of their rights and responsibilities. Absent the ability to rely upon government information, the credibility of government programs is severely undermined and the ability of government to function is crippled.

CIMRO in this instance allegedly conducted an investigation under the statutory and regulatory mandates and its contracts with the Secretary, but instead of submitting

its recommendations for sanction to the Secretary for review and possible discipline as required by law, CIMRO proceeded to discipline the Petitioner itself. (1st Am. Compl. at Ct. I, § 7-10, App. Brief A3-A4) CIMRO did not have the authority to discipline the Petitioner. (1st Am.Compl. at Ct. I, § 13, App. Brief A4) CIMRO allegedly entered into a sanctioning process which was not set forth in the statute or the regulations.

The sanctions imposed and this unlawful sanctioning process were allegedly not explained in writing to the Petitioner as mere recommendations to the Secretary. Imposition of sanctions are required to be provided to participants in writing. 42 C.F.R. 1004.70 (1991).

This sanction was the establishment of a corrective action plan. The corrective action plan was apparently established for a time period of two years. If the sanctions were successfully complied with, CIMRO would apparently make no recommendations to the Secretary.

This process did not include informing the Petitioner that the Petitioner did not have to participate in this unlawful practice. This process did not even include providing the Petitioner with a copy of this "corrective action plan". This informal process may have been created through amendments to the CCFMC contract with the Secretary (Appellees App. Brief Appendix A50-51). This is an alleged instance where the Secretary conspired with its contractual agent, CIMRO, to deprive this Petitioner of his rights under the statutory and regulatory scheme.

As pointed out by both Petitioner and Respondent in their briefs before the United States Court of Appeals for the Seventh Circuit, the law was changed to allow this unauthorized sanctioning process. The statute now includes the language authorizing corrective action plans "if appropriate, after the Petitioner or person has been given a reasonable opportunity to enter into and complete a corrected action plan (which may include remedial education), agreed to by the organization, and has failed

successfully to complete such plan". (Public Law 101-508, § 4205(a)(1)(A) (1990)).

This statutory change is clearly evidence that the alleged actions of Respondents were not previously authorized by Congress. This type of activity carried out by federal officials is reprehensible. The United States Congress sets forth the parameters for this federal program including protections against violations of constitutional rights. The agency then adopted the regulations for this program. In this instance, allegedly, by contracting with private entities to be its agents, the government ignored the Congressional mandates and its own regulations.

These circumstances must be closely examined to prevent federal officials from trampling on the rights of individual citizens by not following the laws they are required to uphold and implement. The Supreme Court must determine that enactment of a comprehensive statutory and regulatory scheme by Congress in and of itself does not preclude a cause of action against federal officials for constitutional violations when those same federal officials ignore the comprehensive statutory and regulatory scheme.

CONCLUSION

ISMS believes that the Petitioner's Petition for a Writ of Certiorari should be granted to resolve the conflict between circuits of the Supreme Court to find that an individual may bring a cause of action for monetary damages when federal officials violate an individual's constitutional rights, and frustrate or ignore a comprehensive statutory and regulatory scheme established to protect those constitutional rights. For these reasons, the Supreme Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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